No. 14222.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN FINANCE CORPORATION OF CALIFORNIA,
Appellant,

vs.

CLIFTON C. PIERCE and EILEEN E. PIERCE,
Appellees.

APPELLEES' BRIEF.

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Statement

Argument

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TOPICAL INDEX

PAGE

I.

Statement of facts 1

II.

Argument 2

1. The contract does not specify who should pay the assessments 2
   a. No clause of the contract expressly states who should pay such assessments; and the assessments, not being proratable, do not fall into the proratable "other expense" category 2
   b. The contract does not contain a ceiling on the sum appellant should be required to pay for assessments, taxes, or expenses 3
   c. The contract contains no provision against encumbrances arising after the escrow was opened 4
   d. Any ambiguity or uncertainty must be resolved against appellant 4
2. Even if assessments might have been included in the "other expenses" clause, liability for payment of the assessments involved here would fall upon appellant 5
   a. The assessments would have to be prorated, and the entire base period followed close of escrow 5
   b. The assessments did not become "expenses" until after close of escrow 6
3. Under California law, in the absence of a contrary contractual provision, the purchaser must pay assessments levied after escrow is opened 7
4. Neither personal liability to pay the assessments nor a lien or charge against the stock was created by the levy of assessments 9
5. Summation 11

Conclusion 12

TABLE OF AUTHORITIES CITED

Cases	PAGE
Commissioner of Internal Revenue v. Moir, 45 F. 2d 356	8
Deming v. Smith, 19 Cal. App. 2d 683	8
Hansen v. Bear Film Co., 28 Cal. 2d 154	11
Hawi Mill v. Finn, 82 Cal. App. 255, 255 Pac. 543	7
Marr v. Rhodes, 131 Cal. 267, 63 Pac. 364	7
McDonald v. Huff, 77 Cal. 279, 19 Pac. 499	7
McMillan v. O'Brien, 219 Cal. 775, 29 P. 2d 183	9
McMurtrey v. Bridges, 41 Okla. 264, 137 Pac. 721	8
Miller & Lux v. Sparkman, 128 Cal. App. 449, 17 P. 2d 772	7
Mohr v. Joslin, 162 Iowa 34, 132 N. W. 981	8, 9
Wilck v. Herbert, 78 Cal. App. 2d 392	5

Statutes	
Civil Code, Sec. 1654	5
Nevada Compiled Laws, Sec. 1603(6)	9
Nevada Compiled Laws, Sec. 1673	9

Textbooks	
20 California Jurisprudence, Sec. 7, p. 907	9
35 Corpus Juris Secundum, p. 207	6

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vs.

Clifton C. Pierce and Eileen E. Pierce,
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APPELLEES' BRIEF.

I.
STATEMENT OF FACTS.

The facts of the case are accurately set forth in Appellant's Opening Brief, with one possible exception. It is suggested at the top of page 5 that some question may remain as to the materiality or admissibility of evidence concerning removal of certain trees and debris from the ditches and water channels. It was stipulated as a fact that this work was done approximately every four years, for the benefit of the Nevada property [Tr. p. 39], and the trial court expressly so found [Tr. p. 46]. Since Appellant has not specified the finding as error, the evidence must be considered to be before the court on this appeal.

II.

ARGUMENT.

1. The Contract Does Not Specify Who Should Pay the Assessments.

(a) No Clause of the Contract Expressly States Who Should Pay Such Assessments; and the Assessments, Not Being Proratable, Do Not Fall Into the Proratable "Other Expense" Category.

The entire contract between the parties consisted of two documents, namely, the Exchange Agreement and the Escrow Instructions. The latter by its terms was not to alter, supersede, cancel, or change the former [Tr. p. 30]. To determine who was liable to pay the assessments, the contract must first be examined, for regardless of what the law may provide as to who pays, absent a specific contractual provision, the parties were free to specify which of them should pay.

But the contract is silent on the subject. The Exchange Agreement *does* provide that the following items shall be prorated: (a) Taxes; (b) Insurance; (c) Rents, and (d) "Other expenses affecting said properties" [Tr. pp. 23-24]. This language is given effect in the Escrow Instructions, where the bank is instructed to adjust interest on encumbrances, prorate taxes, prorate rentals, and prorate insurance premiums [Tr. p. 32].

Not a word about assessments. Appellant argues that assessments must be included in the phrase "other expenses affecting said properties" (App. Br. p. 11), which the Exchange Agreement provides "shall be prorated." Nevertheless, Appellant devotes one-fourth of its argument to the proposition that such assessments can *not* be

prorated (App. Br. pp. 9-10). Since the parties did not specify a base for proration of assessments, it would appear that they could not have intended to include assessments within the proratable class of "other expenses."

(b) The Contract Does Not Contain a Ceiling on the Sum Appellant Should Be Required to Pay for Assessments, Taxes, or Expenses.

Appellant suggests that the parties specifically contracted as to the extent of liens outstanding (App. Br. pp. 8-9), referring to pages 21 and 22 of the Transcript of Record, where it is stated that certain listed encumbrances exist on the Nevada property, and "All of said items of Second Parties are being considered on a basis of $203,000.00, including the amounts of indebtedness thereon." Appellant states (App. Br. p. 9):

> "It was not contemplated that the plaintiff would in addition assume the liability of $3,000.00 for the assessment on the water stock, which assessment was levied during the period of the escrow."

The referenced pages simply do not support the contention. The parties had it clearly in mind that Appellant would assume liability for items other than the listed encumbrances, and provided in the Exchange Agreement for the payment by Appellant of taxes and insurance which did not form a part of the $203,000.00 figure.

Furthermore, the value of $203,000.00 was fixed with knowledge on the part of both parties that assessments on the ditch stock were imminent, since they came at more or less regular intervals. The amount of the assessments must have been taken into consideration in determining the value of the ditch stock. As the likelihood of a prompt dividend invariably inflates the value of a

common stock, the probability of a prompt assessment can only have a contrary effect. It would be manifestly unjust that Appellant should receive the ditch stock at a reduced price because of a pending assessment, but nevertheless require Appellees to pay that very assessment.

(c) The Contract Contains No Provision Against Encumbrances Arising After the Escrow Was Opened.

The parties contemplated that the state of title would be guaranteed by a title company, and therefore neither the Exchange Agreement nor the Escrow Instructions contain any agreement on the part of any of the parties that the property transferred should be free of encumbrances at the close of escrow. The Exchange Agreement *does* provide, however, that the parties should provide policies of title insurance on their respective properties showing titles to be merchantable and free from encumbrances, except taxes and encumbrances mentioned in the agreement. These were to be furnished within 60 days from opening of escrow [Tr. p. 23]. Policies of title insurance, and nothing more, since under the circumstances no further warranty of title was necessary, the title company having the full responsibility in the event of a defective title.

(d) Any Ambiguity or Uncertainty Must Be Resolved Against Appellant.

The entire dispute now pending could have been avoided had the contract expressly provided which of the parties should pay assessments levied after the opening of the escrow. Appellees submit that the contract makes no provision whatsoever in that regard, and that the burden of paying the assessments therefore falls upon the person

owning the stock when the payment became due. If the contract can be construed to provide otherwise, it is only by a twisted construction of it, and an ambiguous contract is always construed most strongly against the draftsman, in this case the offerer, the Appellant.

Civil Code, Sec. 1654;

Wilck v. Herbert, 78 Cal. App. 2d 392, 411.

2. Even if Assessments Might Have Been Included in the "Other Expenses" Clause, Liability for Payment of the Assessments Involved Here Would Fall Upon Appellant.

(a) The Assessments Would Have to Be Prorated, and the Entire Base Period Followed Close of Escrow.

If the parties *did* intend to include assessments within the term, they must have intended that the burden of payment should lie upon the person who received the benefit. Hence, the proration clause. Since taxes are levied for a fixed fiscal period, and insurance is sold for a fixed term of years, it was unnecessary to state the standard or base to be used for their proration. The very fact the standard or base was omitted is probably conclusive that the parties did not intend to include assessments in the term "other expenses." Still, if they did, the failure to define the base for proration was merely a failure to define something readily determinable from examination of past practices, and clearly defined for the purposes of this suit by the stipulation of the parties. The base period is four years [Tr. p. 39]. Apportionments and prorations are made daily by accountants on the basis of the usual and expectable, and the entire system of tax deductions for depreciation is based upon such apportionments, so the four-year base period reached by stipulation merely

fixes the period which must have been reached as the base period after an examination of the facts.

Both the Findings of Fact [Tr. p. 46] and the stipulation of the parties [Tr. p. 39] are clear on one point—the removal of trees and debris, and clearing of the channels and ditches were for the *benefit* of the Nevada property. A benefit can only act prospectively, not retroactively. The Nevada property did not receive any benefit for the years 1948 to 1952 through work performed in 1952. The benefit is for the years 1952 through 1956, and if there is to be a proration, it must be on a prospective basis. Since payment was not required until May 15, 1952, one month and six days after the escrow had closed, none of the base period for proration fell within the period of defendant's ownership regardless of whether title passed at close of escrow, or upon execution of the Exchange Agreement.

(b) The Assessments Did Not Become "Expenses" Until After Close of Escrow.

Thus, even if the assessments were to be included in the term "other expenses," they became such only *after* the close of escrow, when they were paid. As Appellant has pointed out on page 11 of the Opening Brief, an expense is that which is expended or outlaid. The word is defined at length in Corpus Juris Secundum, volume 35, page 207, *et seq.*, but the various meanings all involve a disbursement. The word is *not* synonymous with "indebtedness." The expenditures, or disbursements, were made after close of escrow, and must fall upon the person holding title to the property at that time. The proration clause was clearly intended to apply to actual disbursements during the escrow period.

3. Under California Law, in the Absence of a Contrary Contractual Provision the Purchaser Must Pay Assessments Levied After Escrow Is Opened.

The contract being silent on the question of who shall pay assessments, the matter must then be governed by the established law of California, which provides that in an escrowed transaction, upon performance by the parties of the terms of the escrow, title passes as of the date the escrow was opened.

> *McDonald v. Huff,* 77 Cal. 279, 283, 19 Pac. 499;
>
> *Miller & Lux v. Sparkman,* 128 Cal. App. 449, 17 P. 2d 772;
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> *Marr v. Rhodes,* 131 Cal. 267, 270, 63 Pac. 364;
>
> *Hawi Mill v. Finn,* 82 Cal. App. 255, 261, 255 Pac. 543.

As of the date escrow was opened, the assessments had not been levied, and it follows that Appellees could not have been held liable for payment of the assessments in the absence of an agreement to pay them. Unless Appellees are to be held liable for all assessments ever levied on the ditch stock from the date of opening escrow to the infinite future, no reason appears why they should be required to pay the ones involved here, where payment was not required by the terms of the levy until more than four months after title to the property had passed, and more than a month after escrow had closed.

On page 7 of its brief, Appellant cites cases from other jurisdictions for the proposition that the doctrine of "relation back" applies only in cases where it is necessary to give "effect to the instrument, to prevent injustice, or to effectuate the intention of the parties." Although this narrow proposition does not appear to be the law of

California, if the parties had *any* intention that Appellees might in any event become liable to pay any assessments, it was expressed in the "other expenses" clause [Tr. p. 24], which provides for proration of the charge. It would both defeat the intention of the parties and be the rankest of injustices to require Appellees to pay the assessment, yet permit Appellant to reap the full benefit of the work done.

Neither of the cases cited by Appellant in opposition to the doctrine of relation back are applicable here. *Mohr v. Joslin,* 162 Iowa 34, 132 N. W. 981 (1913) (App. Br. p. 7), was decided under a section of the Iowa code which established who was liable for taxes as between vendor and purchaser, and since the contract involved had no contrary provision, it was held to be the defendant's duty to discharge the tax involved. In *McMurtrey v. Bridges,* 41 Okla. 264, 137 Pac. 721 (1913), the contract expressly provided for the defendant's payment of taxes due "at time of delivery," which phrase was construed to mean "close of escrow." Hence, even if title had related back, the defendant would have been obliged to pay the tax.

On the other hand, in *Commissioner of Internal Revenue v. Moir* (C. C. A. 7, 1930), 45 F. 2d 356, the court looked at the realities of the situation, and concluded that where the defendant had the power to obtain title by simply paying the purchase price into escrow, he had title for all practical purposes, and was taxed as though he held title from the date escrow was opened.

In *Deming v. Smith.* 19 Cal. App. 2d 683, 687, the California court said the doctrine of relation back applied when the grantee could obtain title by the mere performance of his obligations under the purchase agreement,

namely, payment of the purchase price. That is the precise situation involved here, and it is submitted that the California cases must govern the decision of this court.

4. Neither Personal Liability to Pay the Assessments nor a Lien or Charge Against the Stock Was Created by the Levy of Assessments.

If it is Appellant's contention that Section 1673 of the Nevada compiled laws is comparable to the Iowa code section which governed the decision in *Mohr v. Joslin* (1913), 162 Iowa 34, 132 N. W. 981 (App. Br. p. 7), and establishes a personal liability, the suggestion is not strongly advanced, for in the following paragraph of its brief, Appellant states that the assessment is a lien on the stock, *not* a personal liability (App. Br. p. 8). No doubt the point is not pressed because if Appellant paid off Appellees' personal liabilities without their request, it acted as a mere volunteer and would not be entitled to reimbursement. (*McMillan v. O'Brien* (1934), 219 Cal. 775, 779, 29 P. 2d 183; 20 Cal. Jur., "Payment," Sec. 7, p. 907.)

The procedure set forth in Section 1673, relating to a method of collection of a shareholder's debt to the corporation, has no relation to the procedures which might be adopted by a corporation to assess its paid-up shares, under Section 1603(6). Procedure for assessment of paid-up shares should be set forth in the articles of incorporation or the by-laws of the corporation, including proper provisions for notice, protest, foreclosure, sale, redemption, call, or cancellation of the stock, and the like. The articles of incorporation and by-laws of the corporations involved here *may* contain such provisions, but they do not appear in the record of this case. Indeed,

while Appellant discusses the effect of the assessments as liens or charges, there is nothing in the record (except Appellants' possibly mistaken fear of foreclosure) to indicate that the ditch companies actually had the legal power or right to levy assessments, or to foreclose the stock, or take any further steps, or even to deny the delinquent shareholder the use of the ditches. What the corporations must do to create liens, if they can do so, does not appear. The procedure by which shareholders might protest or contest assessments is not shown, nor the effect such protest or contest might have upon any "lien date." While the date upon which the assessments became a lien or charge against the stock or other property is not material, for reasons set forth elsewhere herein, since the date certainly postdated the opening of escrow, it must be emphasized that the record fails to set forth facts sufficient to establish the existence of any charge or lien against the stock or the other property.

Certainly, to establish a lien, notice to the assessee would be an essential element of due process. The record shows that as to the Old Channel Ditch Company stock the notice was not even mailed out to the shareholders until *after* the escrow had closed. Notice of the Young Ditch Company assessment was sent to stockholders before close of escrow, but the record does not show whether respondents received the notice, or whether they had taken steps to protest the assessment, or whether, prior to May 15th they would have taken steps to protest the assessment. If the assessment had already been paid before its due date by a volunteer who was not liable to make payment, such a protest would be meaningless; the payment would render moot any inquiry by Appellees into the propriety of the levy or the advisability of protesting or contesting it.

Cf. Hansen v. Bear Film Co. (1946), 28 Cal. 2d 154, 180, 168 P. 2d 946, where the court pointed out that the payment by a corporation of the alleged indebtednesses of its deceased chief stockholder, instead of requiring the creditors to file claims in the probate proceedings, was a voluntary payment for which the corporation could not take credit. It was so held, even though on the facts set forth at great length by the court the corporation might well have been held liable for the personal debts of the stockholder, who had managed the corporation as his *alter ego,* since by making payment under such circumstances, the claim was not subject to the court's scrutiny. The case is similar to the present in that while Appellant may have been justified in paying Appellees' obligation on May 15th, or even on the expiration of any protest or contest period, any payment before that time was a mere voluntary act.

5. Summation.

While the parties did not specify in their contract who should pay the assessments involved, yet, should the assessments be classified as "other expenses affecting said property," the full amount thereof must be prorated to the period for which Appellant is liable for payment. Absent a contractual provision as to who must pay such an assessment, under California law the duty falls upon Appellant, the grantee.

Even if the contract and the law provided otherwise than as stated above, by paying the assessments before the stated due date Appellant rendered any protest or contest of the levy of assessment impractical and moot; and as a mere volunteer Appellant would not be entitled to reimbursement.

Conclusion.

Judgment of the District Court was correct, and it should be affirmed.

Respectfully submitted,

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